Supreme Court, U.S.
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85-1549

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

G. J. DEASY INVESTMENT, INC., d/b/a Texas Vehicle Management,

Petitioner,

V.

JAMES A. MATTOX, Attorney General of the State of Texas, Russell Harding, Executive Director of the Texas Motor Vehicle Commission, Erwin Elias, Chairman of the Texas Motor Vehicle Commission, Dan Boone, Vice Chairman of the Texas Motor Vehicle Commission, and Bill Rogers, Ted Treadaway, George Miller, Rudy Garza, Sally Hermann, Robert Hoy, and Thomas Demarest, Members of the Texas Motor Vehicle Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER RICE V. NORMAN WILLIAMS CO. FORECLOSES ANY CHALLENGE WHATSOEVER TO SECTION 5.04 OF THE TEXAS MOTOR VEHICLE CODE AS BEING A DELEGATION TO AUTOMOBILE MANUFACTURERS OF THE NEW CAR DEALER LICENSING AUTHORITY OF THE STATE OF TEXAS IN VIOLATION OF PETITIONER'S PROCEDURAL DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

LIST OF PARTIES

The parties listed in the caption hereof are all the parties to the proceeding sought to be reviewed.

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Texas, Dallas Division entered summary judgment in favor of the Respondents on March 1, 1985. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on December 18, 1985. This petition for certiorari is filed within ninety (90) days after the case became final. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV Section 1: No state . . . shall . . . deprive any person of life, liberty, or property without due process of law. . . .

Texas Motor Vehicle Commission Code, TEX.REV.CIV.STAT.ANN.art. 4413(36) §1.03 (Vernon Supp. 1986).

> (4) "Dealer" means any person engaged in the business of buying, selling or exchanging new motor vehicles at an established and permanent place of business pursuant to a franchise in effect with a manufacturer or distributor.
>
> . . .
>
> (8) "Franchise" means one or more contracts under which (A) the franchisee is granted the right to sell new motor vehicles manufactured or distributed by the franchisor; (B) the franchisee as an independent business is a component of franchisor's distribution system; (C) the franchisee is substantially associated with franchisor's trademark, tradename and commercial symbol; (D) the franchisee's business is substantially reliant on franchisor for a continued supply of motor vehicles, parts, and accessories for the conduct of its business; or (E) any right, duty, or

obligation granted or imposed by this Act is affected.

TEX.REV.CIV.STAT.ANN.art. 4413(36) §4.02 (Vernon 1976).

> Sec. 4.02 (a) The application for a dealer license shall be on a form prescribed by the Commission which shall include information on the applicant's financial resources, business integrity, business ability and experience, franchise agreement, physical facilities for sales and service, parts and accessories, new vehicle inventory and other factors the Commission considers necessary to determine applicant's qualifications to adequately serve the motoring public.

Texas Motor Vehicle Commission Code, TEX.REV.CIV.STAT.ANN.art. 4413(36) §5.04 (Vernon Supp. 1986).

Sale of New Motor Vehicles

> Sec. 5.04. No person may engage in the business of buying, selling, or exchanging new motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired. In this section, the term

"engage in the business of buying, selling, or exchanging new motor vehicles" means:

(1) displaying for sale new motor vehicles on a lot or showroom; or

(2) advertising for sale new motor vehicles; or

(3) regularly or actively soliciting buyers for new motor vehicles.

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STATEMENT OF THE CASE

The federal questions sought to be reviewed in this case were initially raised in the United States District Court for the Northern District of Texas, Dallas Division, and Petitioner seeks review of the lower courts' judgment on Petitioner's challenge to the constitutionality of certain provisions of the Texas Motor Vehicle Code under the Fourteenth Amendment to the United States Constitution.

1. The Texas Motor Vehicle Commission Code. In 1981, in response to lobbying by the Texas Association of Automobile Dealers ("TADA"), representing franchised new car dealers, the Texas Legislature amended Article 4413 (36) of the Texas Revised Civil Statutes Annotated entitled "Motor Vehicle Commission Code" (hereinafter referred to as the "MVCC"), which regulates the sale of new motor vehicles in the State of Texas. The MVCC, as amended in 1981, provided, in pertinent part:

> Sec. 5.04. No person may represent to the public, by advertising or

> other means, that he is engaged in the business of buying, selling, or exchanging <u>new</u> motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired (emphasis added).

This amendment was sought by the TADA in order to stop what was to some new car dealers (and manufacturers) an invidious practice known as "bootlegging." "Bootlegging" is the prejorative term ascribed to the practice whereby an automobile dealer acquires and resells as new a make of car for which it holds no franchise from the manufacturer. Petitioner, Texas Vehicle Management ("TVM"), is and has been in the business referred to by the TADA as "bootlegging," acquiring his cars from franchised dealers and selling them to consumers on manufacturer's statements of origin.

The TADA soon determined that the 1981 amendment to Section 5.04 of the MVCC was not "tight enough" to stop bootlegging, since TVM and others similarly situated complied with the statute by simply refraining from "representing to the public" that they were selling "new" cars. Therefore, again in response to "legislative input" from the TADA, the Texas Legislature in 1983 amended Section 5.04 once more, this time by making a franchise from the manufacturer of a particular make of vehicle a prerequisite to entitlement to a license to sell such vehicle.

Section 5.04, as amended in 1983, provides:

> Section 5.04. SALE OF NEW MOTOR VEHICLES. No person may engage in the business of buying, selling, or exchanging new motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired. In this section, the term

"engage in the business of buying, selling, or exchange new motor vehicles" means:

(1) displaying for sale new motor vehicles on a lot or showroom; or

(2) advertising for sale new motor vehicles; or

(3) regularly or actively soliciting buyers for new motor vehicles.

Section 1.03 of the MVCC, as amended in 1983, provides, in pertinent part:

(2) "New motor vehicle" means a motor vehicle which has not been the subject of a "retail sale" as defined in Subdivision (2), Section 152.001, Texas Tax Code.

(4) "Dealer" means any person engaged in the business of buying, selling or exchanging new motor vehicles at an established and permanent place of business pursuant to a franchise (emphasis added) in effect with a manufacturer or distributor.

(8) "Franchise" (emphasis added) means one or more contracts under which (A) the franchisee is granted the right to sell new motor vehicles manufactured or distributed by the franchisor; (B) the franchisee as an independent business is a component of franchisor's distribution system; (C) the franchisee is substantially associated with franchisor's trademark, tradename and commercial symbol;

(D) the franchisee's business is substantially reliant on franchisor for a continued supply of motor vehicles, parts, and accessories for the conduct of its business; or (E) any right, duty, or obligation granted or imposed by this Act is affected.

Section 152.001 of the Motor Vehicle Sales Tax provisions of the Texas Tax Code provides, in pertinent part:

> (2) "Retail sale" means a sale of a motor vehicle except:
>
> (A) a sale in which the purchaser acquires a vehicle for the exclusive purpose of resale.

Section 4.02 of the MVCC provides, in pertinent part:

> Section 4.02 (a) The application for a dealer license shall be on a form prescribed by the Commission which shall include information on the applicant's financial resources, business integrity, business ability and experience, franchise agreement (emphasis added), physical facilities for sales and service, parts and accessories, inventory, new vehicle inventory and other factors the Commission considers necessary to determine applicant's qualifications to adequately serve the motoring public.

TVM has a net investment in real estate at its dealership location of $1,500,000, and has

approximately thirty (30) employees. Its showroom and offices are situated on a two-acre tract in Dallas County, Texas. TVM maintains a 25,000 square foot service facility and employs several qualified service personnel. TVM offers extended service and repair warranties, and is licensed by the State of Texas to perform motor vehicle inspection and by the Texas Highway Department to sell used cars.

However, because TVM does not come within the MVCC's definitions of a manufacturer of new motor vehicles, a distributor of new motor vehicles, or a representative of a manufacturer or distributor, TVM cannot qualify for a license in any of those capacities. Furthermore, TVM is not a dealer as defined in the MVCC, since TVM has not entered into any franchise agreement with a vehicle manufacturer or distributor, with the exception of Avanti II. Under the MVCC as amended in 1983, TVM is effectively precluded, prohibited, and barred by law from obtaining a dealer license, regardless of its qualifica-

tions, experience, financial ability, customer goodwill, and performance, and therefore cannot lawfully display, advertise, or sell new motor vehicles to consumers in the State of Texas, except vehicles manufactured by Avanti II.

Because the threatened and imminent enforcement of Section 5.04 of the MVCC would inevitably result in TVM's termination of new motor vehicle sales and loss of business, TVM filed its Complaint and Application for Declaratory and Injunctive Relief in the District Court predicated on 42 U.S.C. §1983 and 28 U.S.C. §1343(a)(3) for, among other things, alleged violations of Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. RICE V. NORMAN WILLIAMS CO. DOES NOT REQUIRE AFFIRMANCE OF THE JUDGMENT BELOW

In affirming the District Court's summary judgment in favor of Defendants-Respondents, the Fifth Circuit relied entirely on the following language from Rice v. Norman Williams Co., 102 S.Ct. 3294 (1982):

> Respondents contend that the designation statute denies them due process of law. According to respondents, California has established a "second tier of private licensing over the state's licensing process," and therefore procedural due process protections apply with regard to the distiller's designation decisions.
>
> We find this contention without merit. . . . What respondents are really challenging is the California Legislature's decision to give such a power to the distiller without establishing any criteria to govern the exercise of that power. The Due Process Clause does not authorize this court to assess the wisdom of the California Legislature's decision.

Id. at 3301-02 (citation omitted) (quoted in Deasy v. Mattox, 778 F.2d at 1092). The Fifth Circuit held that "[t]his case [Deasy] is com-

pletely controlled by this language from Rice. TVM contends this portion of the Supreme Court's opinion is dicta. Such contention should be addressed to that Court, not this one." Deasy, 778 F.2d at 1092 (emphasis added). Thus, the Fifth Circuit clearly recognized the necessity of directing this Court's full attention to this language in Rice, and accordingly reserved the question for this Court of whether or not this portion of Rice, was intended as dicta. Therefore, this petition for certiorari presents this Court the opportunity to squarely address this important issue of due process instead of relegating the status to this area of the law to the confines to the mere afterthought dicta in Rice.

In Rice, this Court upheld challenges to the constitutionality of the so-called "California designation statute," which prohibited licensed liquor importers from purchasing or accepting delivery of any brand of liquor unless such importer is "an authorized importer of such brand by the brand owner or his

authorized agent." Although the opinion primarily dealt with the Supremacy Clause challenge to the statute (predicated upon antitrust principals), this Court additionally upheld the constitutionality of the designation statute in the face of a procedural due process challenge.

TVM contends that the courts below erred when it deemed Rice to be controlling. TVM acknowledges that the facts of Rice and this case are basically indistinguishable, however, the Rice decision does not require affirmance of the District Court's judgment for the following reasons:

First, Rice is primarily a Supremacy Clause decision in the context of antitrust law principles.

Second, the procedural due process challenge in Rice was presented for the first time at the Supreme Court, and was not considered by the court below. The Rice Court noted: "Respondents seek to support the judgment of the Court of Appeal on three federal grounds not

considered by the court below." Id., 102 S. Ct. at 3301. The procedural due process/delegation ground was one of the three. It is a fundamental rule of judicial restraint that the Supreme Court will not reach constitutional questions in advance of the necessity of deciding them. Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267, 2279 (1984). Further, a long history of cases supports the proposition that the Supreme Court will not decide appeals from the highest court of a state on grounds not addressed by the state court. Illinois v. Gates, 103 S.Ct. 2317 (1983). Therefore, the Supreme Court's summary treatment of the procedural due process/delegation arguments in Rice is clearly dicta. Thus, the mere invocation of Rice dicta should not foreclose a serious and well supported, head-on challenge to the constitutionality of the MVCC. Unfortunately, however, the courts below and at least two other federal district court cases have chosen this path of "lease judicial resistance."

See Lanierland Distributors, Inc. v. Strickland, 544 F. Supp. 747 (N.D. Ga. 1982); Florida Citrus Packers v. California, 549 F. Supp. 213, 217 (N.D. Cal. 1982).

Third, the above-quoted response of the Supreme Court to the procedural due process/delegation challenge in Rice, relied upon the case of Ferguson v. Skrupa, 372 U.S. 726 (1963). Ferguson is not a procedural due process case. In Ferguson, the Plaintiff made arguments that could only be characterized as substantive due process. In Ferguson, the Supreme Court simply noted that substantive due process had been dead for several years. The case at bar is not a substantive due process case, but seeks to insist upon and preserve procedural due process rights.

Fourth, the most important reason that Rice should not control the case at bar is that if the courts below are correctly applying the holding in Rice, then the delegation doctrine relied upon by TVM is dead as a safeguard

against abusive legislative delegations of authority. Even Justice Stevens in his concurring opinion in Rice evidenced some concern with the unbridled power delegated to distillers under the California statute:

> The question on remand should be whether the statute's provision to distillers of an additional club over California importers affords distillers an unreasonable degree of unsupervised power to regulate their distribution practices that they would not otherwise enjoy under a free market. Because that question cannot be determined without a more sophisticated inquiry, I concur in the Court's judgment.

102 S. Ct. at 3304.

Justice Stevens, in his dissenting opinion, in McGautha v. California, 402 U.S. 183, 274 (1971) perhaps made the most appropriate statement for distinguishing Rice: "At the outset, candor compels recognition that our cases regarding the delegation by Congress of law-making power does not always say what they seem to mean." Surely the Rice Court's unnecessary and glancing treatment of the delegation and due

process questions was a Supreme Court case which did not say what it seemed to mean. What Petitioner is respectfully requesting of this Court is that a "more sophisticated inquiry" be made with respect to Petitioner's procedural due process/delegation challenge to the constitutionality of the MVCC than was made by the courts below.

II. SECTION 5.04 OF THE MVCC VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY CONDITIONING THE RIGHT TO OBTAIN A NEW CAR DEALER LICENSE UPON THE DISCRETIONARY AND ARBITRARY DETERMINATION OF AN AUTOMOBILE MANUFACTURER TO GRANT A DEALER FRANCHISE FOR ITS PARTICULAR MAKE OF VEHICLE

A. TVM possesses a liberty interest protectible under the Fourteenth Amendment to continue to engage in the sale of new motor vehicles

The right to hold specific employment and to follow a chosen profession free, from arbitrary and unreasonable governmental interference, comes within the liberty and property concept of the Due Process Clause which provides that no person shall be denied liberty or prop-

erty without due process of law. Green v. McElroy, 360 U.S. 474 (1959); United States v. Robel, 389 U.S. 258 (1967); United States v. Briggs, 514 F.2d 794 (5th Cir. 1975), Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1975), Hanson v. Unified School District No. 500, 364 F. Supp. 330 (D. Kan. 1973). TVM's desire to continue to carry on the occupation, business, and trade of selling new motor vehicles is thus a protectible liberty interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This liberty interest, of course, is not absolute and can be regulated or even eliminated by the State, but not without due process. Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1493 (1985); Forcade v. Knight, 416 F.Supp. 1025 (D.C. 1976), aff'd in part and remanded, 569 F.2d 124 (D.C. Cir. 1977); Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973), aff'd, 507 F.2d 611 (5th Cir. 1975); Ad

Hoc Committee On Judicial Administration v. Commonwealth of Massachusetts, 358 F. Supp. 953 (D. Mass. 1973), aff'd, 488 F.2d 1241 (1st Cir.). Through Section 5.04 of the MVCC, the State of Texas has not, eliminated the business of selling new cars as a lawful business, but has merely provided licensing procedures as a method of determining who may and who may not pursue such activity. TVM contends that the state's licensing procedures must comport with procedural due process standards.

B. The Texas Legislature's delegation of licensing power to private automobile manufacturers without providing standards for the exercise of such power and without providing opportunity for meaningful review, is an unconstitutional deprivation of TVM's liberty interest in violation of the Fourteenth Amendment guarantee of procedural due process

The constitutional prohibition against delegation of legislative power to private groups is of long-standing duration and continues to survive today in challenges to state

action under the Due Process Clause. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), Plaintiff challenged the constitutionality of subdivision (g) of Part III of the Bituminus Coal Conservation Act which provided, in pertinent part:

> The wage agreement or agreements negotiated by collective bargaining in any district or groups of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such district in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.

Id. at 283-84. The Bituminus Coal Act provisions immediately took effect when the requisite percentage of miners and producers acted, without any intervention or review by the president or any executive agency. The provisions of the Act effectively granted various industry representatives the power to establish law and

to promote their own self-interest. The Supreme Court struck down the statute as unconstitutional under procedural due process standards (among other reasons), holding:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interest of others in the business . . . . [Regulation of coal production] is necessarily a governmental function, since in the very nature of things, one person may not be entrusted with power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded, and so clearly a denial of rights safeguarded by the Due Process Clause of the Fifth Amendment, that it is unnecessary to do more than referred to questions of this court which foreclose the question.

Id. at 311 (emphasis added).

TVM fully recognizes that Carter Coal has been generally referred to as a "substantive due process" case. For that reason, the vitality of the "delegation doctrine" has been questioned. See Yakus v. United States, 321 U.S. 414, 452 (1944) (Roberts, J., dissenting); Liebmann, Delegation To Private Parties In American Constitutional Law, 50 IND. L. J. 650, 652 (1975). Carter Coal's delegation holding, however, remains alive in the form of procedural due process analysis of improper delegation of legislative authority. Furthermore, although Carter Coal concerned delegation analysis of a federal statute, courts have followed the lead Carter Coal in the context of delegation under state statutes. For example, in United Citizens Party of South Carolina v. South Carolina State Election Commission, 319 F. Supp. 784 (D.S.C. 1970), plaintiffs challenged a South Carolina election statute as an unconstitutional delegation of power by the legislature to the estab-

lished private political parties of South Carolina to fix the specific deadlines by which candidates must be nominated and announced. In holding the South Carolina statute to be in violation of the Due Process Clause, the Three-Judge District Court grounded its holding on Carter Coal and the "black letter rule now so firmly fixed that it is found in legal encyclopedias that a legislature may not delegate legislative functions to private persons or associations." Id. at 787-88. See also Prudential Property and Casualty Co. v. Insurance Commission of South Carolina, 534 F. Supp. 571 (D. S.C. 1982), aff'd, 699 F.2d 690 (4th Cir. 1983); Poe v. Menghini, 339 F. Supp. 986, 994-95 (D. Kan. 1972) (Three-Judge Court, citing Carter Coal, invalidated a Kansas abortion statute as an unconstitutional delegation of legislative powers to a private corporation under the Fourteenth Amendment.)

Furthermore, the judiciary's reliance on Carter Coal's delegation holding in due process

analysis is also advocated by a number of constitutional commentators. "There must be some limit to the extent to which (the legislature) can transfer its own powers through other bodies without guidance as to how these powers should be exercised . . . . the delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion." Wright, Beyond Discretionary Justice, 81 YALE L. J. 575 (1972). "The non-delegation doctrine should gradually grow into a broad requirement extending beyond the subject of delegation -- that agencies with discretionary power must do about as much as feasible to structure their discretion through appropriate safeguards and to confine and guide their discretion to standards, principals, and rules." K. DAVIS, ADMINISTRATIVE LAW TEXT §2.08 (3d ed. 1972). "Many of the vices thought to be inherent in delegation to private groups constitute violations of the express constitutional mandates -- particularly the requirements of due process and equal pro-

tection." Liebmann, Delegation To Private Parties In American Constitutional Law, 50 IND. L. J. 650, 660 (1975). "If [the legislature] were to grant a private party the power to control its competitors, there might be a problem regarding whether the persons regulated were deprived of due process by being subject to the will of entities with interests contrary to theirs." J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 151 (1978).

Clearly, then, the delegation doctrine is but one aspect of procedural due process. In response to TVM's delegation challenge to Section 5.04 of the MVCC, the District Court stated:

> In support of its position, Plaintiff cites, among other authority, the line of cases beginning with Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Carter v. Carter Coal Co., 298 U.S. 238 (1936). As the amicus has correctly pointed out, this line of cases involved power allocation among branches of the federal government, not the state government, and this "delegation doctrine" is all but obsolete, even in the federal realm.

Memorandum Opinion and Order (August 15, 1984), Record at 357. The District Court did not cite authority for the foregoing statement, and TVM is of the opinion that the District Court misunderstood the source of the delegation doctrine. The District Court undoubtedly was referring to the delegation doctrine as it evolved from the general constitutional principle of the separation of powers and as developed in Field v. Clark, 143 U.S. 649, 692-93 (1982). This jurisprudential source of the delegation doctrine, of course, is not applicable to the states because the question of separation of powers within a particular state is not for a federal court to decide. Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902); Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957). But also the delegation doctrine is "merely a reflection of the fundamental principles of due process" made applicable to the states through the Fourteenth Amendment. See McGautha v.

California, 402 U.S. 183, 272-273 nn. 21 & 22 (Brennan, J., dissenting).

As TVM has demonstrated, the delegation doctrine obviously lives on in the form of the procedural due process requirements of, at minimum, objective written standards, fair hearing, and review. The argument that the delegation doctrine no longer has any constitutional application is not only against the great weight of authority, but also could never by universally accepted as correct.

Additionally, TVM does not contend that the delegation rule is a per se rule of substantive due process. TVM is fully cognizant of the demise of the substantive of due process over state economic regulation:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down State laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought . . . .

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955), citing Munn v. Illinois, 94 U.S. 113 (1876). However, the District Court improperly viewed TVM's procedural due process challenge as one challenging the substance or wisdom of the legislature's decision. Of course, almost every challenge to the constitutionality of the statute may be characterized as a challenge to the "wisdom" of the legislature's decision.

For example, in New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), a case which TVM views as correctly decided, but for the wrong reasons, a California statute required an automobile manufacturer to obtain approval from the New Motor Vehicle Board prior to opening or relocating a franchise only if an existing franchise is nearby and the existing franchisee protests the opening or relocation. Id. at 98. The Three-Judge Court held that the absence of a prior hearing requirement to determine the merits of the

protest (and the accompanying delay) denied manufacturers and their proposed franchisees procedural due process. Id. at 99-100. On appeal, the Supreme Court, however, characterized the challenge as one of substantive due process, and as such, was foreclosed by the demise of the substantive due process concept in the area of state economic regulation. Id. at 106-107. By comparison, Mr. Justice Stevens, in his dissent, characterized the constitutional challenge as one of procedural due process, and stated:

> This case does not involve the constitutionality of any of the substantive rules adopted by California to govern the operation of motor vehicle dealerships and the conditions that must be satisfied to engage in that business. The case involved the validity of a procedure that grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been violated or that is about to be violated.

Id. at 114-15 (Stevens, J., dissenting).

TVM recognizes and agrees that it is within the state's province to delegate licensing

authority to automobile manufacturers. In fact, it is established that, "certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned . . . . [and that] statutes prescribing the terms upon which those conducting certain business may contract, or impose terms if they do not enter into agreements are within the states' competency." Nebbia v. New York, 291 U.S. 502, 508 (1934). Although Appellant does not agree with the decision of the Texas Legislature in amending Section 5.04 to its present form, its legal challenge is based upon the method chosen, not the lack of "wisdom". The only "wisdom" TVM questions is the "wisdom" of the Legislature in enacting a statute which works a deprivation of a protected liberty without providing, at the very minimum, a meaningful review under the Fourteenth Amendment. See Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1493 (1985).

The MVCC is, in effect, a delegation of licensing authority by the Legislature to automobile manufacturers. Section 5.04 prohibits the sale or exchange of new motor vehicles without a valid license issued by the Texas Motor Vehicle Commission (the "Commission"). In considering an application for a dealer license, Section 4.02 provides that the Commission considers, among other items, whether the applicant possesses a franchise agreement with an automobile manufacturer. Indeed, the Respondent has admitted that no license may be issued under the MVCC without a franchise. Thus, the Texas Legislature has delegated new car dealer licensing authority to the private automobile manufacturers by merging the governmental licensing decision with the private franchising decision.

Again, some delegation of licensing authority is arguably within the state's power; however, this particular delegation is not accompanied by any standards, guidelines,

criteria or meaningful review and, therefore, runs afoul with the procedural due process requirements of the Fourteenth Amendment.

Legislative bodies may not abrogate the responsibility to formulate and impose policy regarding matters such as issuance of governmental privileges, by delegating this responsibility to private parties uncontrolled by any standard or rule prescribed by legislative action. Washington v. Roberge, 278 U.S. 116 (1928); Grendel's Den, Inc.. v. Goodwin, 662 F.2d 88 (1st Cir. 1981). To be sure, any statute which confers absolute and arbitrary discretion on the state official to grant or deny a right of privilege is unconstitutional. Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968). Consequently, a licensing statute which confers absolute and arbitrary discretion on private corporations is equally, if not more, constitutionally suspect. Without standards to guide the delegatee, a delegation of legislative or adjudicative power essentially becomes an

abdication of such power, giving the delegatee the freedom to exercise its delegated authority arbitrarily, capriciously, and with impunity. See, e.g., Hallmark Clinic v. North Carolina Department of Human Resources, 380 F. Supp. 1153, 1155, 1156 (E.D.N.C. 1974), aff'd, 519 F.2d 1315 (4th Cir. 1975); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

When the power to determine who may qualify for licenses, which is essentially the licensing power itself, is delegated to private bodies, it is axiomatic that standards or guidelines must accompany such delegation, particularly in the case at bar in which the delegatees are automobile manufacturers. It is clear that, absent some showing of "bad faith" under the Automobile Dealer's Day In Court Act, 15 U.S.C. §1221, or some violation of antitrust law, an automobile manufacturer is free to arbitrarily deny franchise rights to an applicant and free to refuse to deal with any automobile distributor or dealer. See, e.g., Marquis v. Chrysler Corp.,

577 F.2d 624 (9th Cir. 1978); Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683 (6th Cir. 1976); Richardson v. Chrysler Motor Corp., 257 F.Supp 547 (S. D. Tex. 1966).

TVM does not dispute the power of the State to impose reasonable and constitutional regulations upon new motor vehicle dealers. Moreover, TVM does not dispute the private contractual rights of dealers and manufacturers to enter into franchise agreement. But when licensing and franchising are essentially merged into one, the licensing power is all but abdicated to motor vehicle manufacturers and distributors.

Furthermore, TVM does not overlook the fact that Section 4.02 of the MVCC contains "standards" for the Commission's consideration, such as the applicant's financial resources, business integrity, business ability and experience, physical facilities, various types of inventory, and "other factors the Commission considers necessary to determine applicant's qualifications to adequately serve the motoring

public." Further, TVM acknowledges the remedy afforded the Texas Administrative Procedures Act, TEX.REV.CIV.STAT.ANN. art. 6252-13a §19 (Vernon Supp. 1986) (providing for judicial review of agency decisions). However, all of the foregoing "standards," and, most certainly, the Texas Administrative Procedures Act, are not applicable to a private automobile manufacturer's decision to grant a franchise. It is the delegation to the automobile manufacturers which TVM challenges as being wholly without Fourteenth Amendment procedural due process safeguards, and not the delegation to the Commission.

The lack of any standard accompanying the delegation to automobile manufacturers and distributors is further compounded by the fact that the dealer licensing provisions in the MVCC provide no procedural recourse for the aggrieved parties adversely affected by the decision of the automobile manufacturer or distributor, and the fact that such manufacturers and distribu-

tors have a keen interest in the vitality of their own private distribution systems, which are frequently at odds with the public interest.

It is indisputable that the determination of those persons who may qualify for licenses to engage in a chosen occupation involves in the assessment of the facts surrounding a given applicant. When a liberty interest is at stake, such as the right to pursue an occupation, adjudication must meet the requirements of the Fourteenth Amendment. The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385 (1914). The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545 (1965); See also Shaw v. Hospital Authority Board of Cobb County, 614 F.2d 946 (5th Cir. 1980); Sosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 19810.

The requirement of some kind of hearing is closely related to the requirement that dele-

gated power be exercised only according to articulated standards. One without the other is really no process at all. Some "process" is due a license applicant or one who seeks to qualify to engage in a chosen occupation. When a state legislature undertakes to grant private bodies the power to determine which persons may qualify for licenses to do business, adequate procedural safeguards must be supplied. The Texas Legislature's decision to delegate licensing authority to private automobile manufacturers is economic regulations to which TVM should, arguably, be foreclosed from questioning. But when the effect of such a delegation permits a private automobile manufacturer to deprive TVM of its protected liberty to engage in the sale of new automobiles, and such decision is totally without the opportunity for meaningful review, then the Texas Legislature's delegation is in violation of the procedural due process requirements of the Fourteenth Amendment.

The Due Process Clause prohibits (1) state action that (2) deprives a person of a protected life, liberty, or property interest (3) without due process of law. See Goss v. Lopez, 419 U.S. 565, 572 (1975). Under this test, Section 5.04 of the MVCC clearly violates due process of law. First, state action exists when the Commission enforces the decision of an automobile manufacturer to preclude anyone other than a franchised car dealer from selling a particular brand of car. This view is identical to the characterization given by the Rice Court's dicta in justifying the California statute: "[t]he designation statute merely enforces the distiller's decision to deny permission to a California wholesaler to deal in the distiller's products." Rice, 102 S.Ct. at 3302. Second, TVM clearly possesses a protectable liberty under the Fourteenth Amendment to engage in the sale of new motor vehicles. See supra pp. 15-16. Third, Section 5.04 of the MVCC works as a

deprivation of TVM's liberty interest totally without the opportunity for meaningful review.

CONCLUSION

For the foregoing reasons, Petitioner hereby respectfully requests this Court to issue a Writ of Certiorari to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

VIAL, HAMILTON, KOCH & KNOX

By: James H. Baumgartner

James H. Baumgartner, Jr.
Paul D. Schoonover
Wilson Chu

March 18, 1986 ATTORNEYS FOR PETITIONER

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

.J. DEASY INVESTMENT, INC., d/b/a
EXAS VEHICLE MANAGEMENT,
Plaintiff-Appellant,

v.

AMES A. MATTON, Attorney General
the State of Texas, RUSSELL
ARDING, Executive Director of the
exas Motor Vehicle Commission,
RWIN ELIAS, Chairman of the Texas
otor Vehicle Commission, DAN
ONE, Vice Chairman of the Texas
otor Vehicle Commission, and BILL
OGERS, TED TREADAWAY, GEORGE
ILLER, RUDY GARZA, SALLY
ERMANN, ROBERT HOY, and THOMAS
EMAREST, Members of the Texas
otor Vehicle Commission,
Defendants-Appellees.

No. 85-1198

OPINION

Filed December 18, 1985

Before: Charles Clark, Chief Judge, Jerre S. Williams, and W. Eugene Davis, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

SUMMARY

Constitutional Law

Appeal from a grant of summary judgment for the Attorney Gen-
al of the State of Texas. Affirmed.

Texas enacted a statute which makes a franchise from the manufacturer of a particular motor vehicle a prerequisite to entitlement to a license to sell such a vehicle. Texas Vehicle Management (TVM) alleges this is a violation of the due process clause of the Fourteenth Amendment.

[1] *Rice v. Norman Williams Co.*, 102 S.Ct. 3294 (1982), a case nearly identical on the facts, expressly rejected the sort of procedural due process argument TVM makes. Therefore, TVM's argument must fail.

OPINION

PER CURIAM:

G.J. Deasy, d/b/a Texas Vehicle Management (TVM), appeals the district court's grant of summary judgment for the Attorney General of the State of Texas. We affirm.

In 1983, in response to efforts of the Texas Association of Automobile Dealers, the Texas legislature amended Article 4413(36) of the Texas Revised Civil Statutes entitled "Motor Vehicle Commission Code." This statute, particularly § 5.04, regulates the sale of new motor vehicles in Texas. The amendment made a franchise from the manufacturer of a particular vehicle a prerequisite to entitlement to a license to sell such vehicle.

TVM is franchised by only one small manufacturer. Under the statute it cannot qualify for a license to deal in the kinds of new motor vehicles it wishes to sell. Because the threatened and imminent enforcement of § 5.04 would allegedly result in a total loss of business, TVM filed suit against the Attorney General of Texas and other members of the Texas Motor Vehicle Commission, alleging that the statutory amendment violates the due process clause of the Fourteenth Amendment.

TVM argues that the legislature is conditioning the right to obtain a new car dealer license upon the discretionary and arbitrary determination of an automobile manufacturer to grant a dealer

franchise for its particular make of vehicle. There is a constitutional prohibition against delegation of legislative power to private groups. In TVM's view, the Texas legislature has violated TVM's procedural due process rights by delegating licensing power to private auto manufacturers without providing standards for the exercise of that power or an opportunity for review of its exercise.

[1] The arguments put forth by TVM are exactly the same as those made in a case that is nearly identical on the facts. *Rice v. Norman Williams Co.*, 102 S.Ct. 3294 (1982). In *Rice*, the Supreme Court expressly rejected a procedural due process challenge to California's designation statute which prohibited licensed liquor importers from purchasing any brand of liquor unless the importer was the distiller's designated importer.

> Respondents contend that the designation statute denies them due process of law. According to respondents, California has established a "second tier of private licensing over the state's licensing process," and therefore procedural due process protections apply with regard to the distiller's designation decisions.
>
> We find this contention without merit. . . . What respondents are really challenging is the California Legislature's decision to give such a power to the distiller without establishing any criteria to govern the exercise of that power. The Due Process Clause does not authorize this court to assess the wisdom of the California Legislature's decision. *Id.* at 3301-02. (citation omitted)

This case is completely controlled by this language from *Rice*. TVM contends this portion of the Supreme Court's opinion is dicta. Such a contention should be addressed to that Court, not this one. The judgment appealed from is

AFFIRMED.

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APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

G. J. DEASY INVESTMENT, INC. d/b/a TEXAS VEHICLE MANAGEMENT	§	
Plaintiff	§	CIVIL ACTION NO.
VS.	§	3-83-1502-H
JAMES A. MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, et.al.	§	
Defendants	§	

J U D G M E N T

Pursuant to the Court's Memorandum Opinions and Order dated August 13, 1984, and February 28, 1985, Defendants are entitled to judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff take nothing by its suit, and that this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

SIGNED this 1st day of March, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

G. J. DEASY INVESTMENT, INC. d/b/a TEXAS VEHICLE MANAGEMENT	§	
Plaintiff	§	CIVIL ACTION NO.
VS.	§	3-83-1502-H
JAMES A. MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, et.al.	§	
Defendants	§	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants' Renewed Motion for Summary Judgment, filed January 17, 1985; Brief of Amicus Curiae Texas Automobile Dealers Association, filed February 8, 1985; and Plaintiff's response, filed February 15, 1985.

Factual Background

In 1981, the Texas Legislature enacted section 5.04 of Article 4413(36), the Texas Motor Vehicle Commission Code (hereinafter "MVCC"), which provided in relevant part:

> Sec. 5.04. No person may represent to the public, by advertising or other means, that he is engaged in the business of buying, selling, or exchanging new motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired.

In 1983, Section 5.04 was amended to provide:

> Section 5.04. SALE OF NEW MOTOR VEHICLES. No person may engage in the business of buying, selling, or exchanging new motor

> vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired. In this section, the term "engage in the business of buying, selling, or exchange new motor vehicles" means:
>
> (1) displaying for sale new motor vehicles on a lot or showroom; or
>
> (2) advertising for sale new motor vehicles; or
>
> (3) regularly or actively soliciting buyers for new motor vehicles.

Section 1.03 of the MVCC, as amended in 1983, provides in relevant part:

> (2) "New motor vehicle" means a motor vehicle which has not been the subject of a "retail

sale" as defined in Subdivision (2), Section 152.001, Tax Code.

* * *

(4) "Dealer" means any person engaged in the business of buying, selling or exchanging new motor vehicles at an established and permanent place of business pursuant to a franchise in effect with a manufacturer or distributor.

* * *

(8) "Franchise" means one or more contracts under which (A) the franchisee is granted the right to sell new motor vehicles manufactured or distributed by the franchisor; (B) the franchisee as an independent business is a component of franchisor's distribution system; (C) the franchisee is substantially associated with franchisor's trademark, tradename and commercial symbol; (D) the franchisee's business is substantially reliant on franchisor for a continued supply of motor vehicles, parts, and accessories for the conduct of its business; or (E) any

> right, duty, or obligation granted or imposed by this Act is affect.

Section 4.02(a) of the MVCC provides:

> Sec. 4.02(a). The application for a dealer license shall be on a form prescribed by the Commission which shall include information on the applicant's financial resources, business integrity, business ability and experience, franchise agreement, physical facilities for sales and service, parts and accessories, inventory, new vehicle inventory and other factors, the Commission considers necessary to determine applicant's qualifications to adequately serve the motoring public.

The Executive Director of the Texas Motor Vehicle Commission, Russell Harding, testifies by affidavit that the intent and purpose of Section 5.04 is to remedy abuses suffered by consumers who purchase new motor vehicles from persons engaged in the sale of new vehicles, but who are neither authorized, franchised nor

licensed dealers of new vehicles. Harding testifies, and Defendants admit, that Section 5.04, as amended in 1983, is designed to require all new car dealers to obtain a license from the Texas Motor Vehicle Commission. As provided in the MVCC, one condition for obtaining a license to sell new cars is a franchise agreement with a vehicle manufacturer. Failure to satisfy this condition prevents a dealer from obtaining a license.

Harding states that the requirement of a franchise agreement with a manufacturer or distributor is intended to insure: that the purchaser of a new vehicle will receive all warranty benefits to which he is entitled; that the vehicle is prepared and delivered in accordance with manufacturer specifications; that the vehicle is properly registered for warranty coverage and federal safety recall notices; and that new vehicles sold in Texas

comply with federal safety and emission control requirements. Dealers, manufacturers, and distributors must be licensed under the MVCC.

Plaintiff Deasy, doing business as Texas Vehicle Management, is engaged in the business of purchasing new automobiles from various manufacturers' authorized dealerships and offering such vehicles for sale on the manufacturers' statements or origin at reduced prices. Plaintiff is a licensed new car dealer under the MVCC and sells Avanti vehicles. Deasy is also licensed to sell used vehicles. Thus, Plaintiff legally sells new and used cars under the present MVCC.

Plaintiff brings this suit for declaratory and injunctive relief, contending that Section 5.04 of the MVCC is unconstitutional because: (1) it delegates legislative power to motor vehicle manufacturers; (2) it violates the commerce clause by unreasonably burdening

interstate commerce; (3) it violates the supremacy clause by contravening the federal antitrust laws; (4) it unreasonably restrains Plaintiff's freedom of commercial speech under the first amendment; (5) it deprives Plaintiff of protected liberty interests without due process; and (6) it irrationally draws a distinction between franchised and non-franchised new car dealers in violation of the fourteenth amendment's equal protection guarantees.[1]

On August 13, 1984, the Court granted Defendant's Motion for Summary Judgment on the due process, delegation doctrine, and supremacy clause grounds. Summary Judgment was denied as

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[1]Statutes very similar to this one are passed startlingly often by state legislatures. They are challenged in the state court almost as frequently, with mixed results. See Regulation or licensing of business of selling motor vehicles, 57 ALR2d 1265, § 7. In light of the recent vintage of relevant Supreme Court authority, the Court is compelled to commence the inquiry anew.

to the equal protection, commerce clause and first amendment contentions. The parties and the Court now address these issues anew with fresh troops and reinforcements.

Equal Protection

Plaintiff challenges section 5.04 as violating equal protection guarantees because it differentiates between franchised and unfranchised vendors of new motor vehicles. Of course, absent a suspect classification or implication of a fundamental right, such a differentiation need withstand only "rational basis" analysis. The formulation of this level of renew has varied in the past. Basically, though, the Court presumes that the challenged statutory distinctions are constitutional and requires only that they be rationally related to

a legitimate state interest. Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1058 (5th Cir. 1984).

Federal courts must refrain from assuming the role of "superlegislature to judge the wisdom or desirability of legislative policy determinations made in . . . the local economic sphere." New Orleans v. Dukes, 427 U.S. 297, 304 (1976). In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

In examining whether any "conceivable basis" exists for the apparent discrimination[2],

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[2]It should be emphasized that the grounds actually relied on, if any, id. at 179, need not constitute the sole locus of the inquiry. The Court must hypothesize whether any conceivable basis could support the classification, regardless of whether it did. See Dukes at 304-05.

Town of Ball, 746 F.2d at 1061, the structure is two-fold: does the challenged legislation have a legitimate purpose? And, if so, was it reasonable for the legislators to believe that use of the challenged classification would promote that purpose? Western & S.Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981).

Legitimate Purpose

Defendants suggest that section 5.04 was originally intended to serve as a consumer protection measure to remedy the problems of stale automobile warranties, misdirected recall notices, and the unavailability of service facilities for new car purchasers. See section 1.02, Tex.Rev.Civ.Stat.Ann. art. 4413(36) (Vernon 1976); Harding Affidavit; Defendants' Memorandum at 4. The 1983 amendment is argued to have narrowed a loophole that enable

unfranchised dealers to sell new vehicles without necessarily "representing to the public" that they were so engaged. The 1983 legislative history also suggests a consumer protection motivation:

> In addition, the bill prohibits new car sales by unlicensed and unfranchised dealers, since these dealers often lack the facilities to make the initial new car adjustments that inevitably are needed.

House Comm. on Transportation Bill Analysis (Background Information), Tex.C.S.S.B. 1141, 68th Leg. (1983).

In addition, as Amicus notes, the Act also has the stated policy to "insure a sound system of distributing and selling new motor vehicles . . ." Section 1.02. Specifically, it is argued, the Act prevents the unfranchised "bootleggers" from avoiding the overhead expenses associated with the provision of warranty services. The failure to provide such warranty services

diverts the warranty repairs to a franchised dealer that provides such services at a loss, without having enjoyed a profit on the sale.

The Court holds that these purposes are legitimate. See Rice v. Norman Williams Co., 458 U.S. 654, 665 (1982).

Reasonable Belief

The Court next must examine whether it was reasonable for the legislature to believe that the classification between franchised and unfranchised dealers would promote the interests of consumer protection and a sound distribution system.[3] Again, it must be emphasized that the belief need not be correct or empirically

[3]As this analysis goes, it would seem to be necessary only to find a reasonable belief for the accomplishment of any one or the legitimate purposes.

supported at the time or confirmed through experience in the future. Plaintiff cannot prevail if:

> it is evidence from all the considerations presented to [the legislature], and those of which [the Court] may take judicial notice, that the question is at least debatable . . . where there was evidence before the legislature reasonably supporting one classification, litigants may not procure invalidation of the legislature merely by tendering evidence in court that the legislature was mistaken.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

After reviewing the transcripts of testimony before the legislature in support of the 1981 and 1983 enactments, the Court concludes that the legislature's action was not irrational.

Testimony was before the lawmakers supporting the propositions that the unfranchised dealers lack the maintenance

facilities to perform warranty service, see proceedings before the House transportation Committee, 67th Legislature, April 6, 1981, at 9; Senate Committee on Economic Development, 68th Legislature, April 11, 1983, at side 2, page 5, create obstacles to the smooth conveyance of recall notices, id at 16-17, and to the performance of warranty service by franchised dealers, id, at 18, and sell cars with stale warranties, see proceedings of House Transportation Committee, 68th Legislature, April 20, 1983, at 5-6. There was also testimony to support the assertion that warranty service by franchised dealers can be a losing proposition. See proceedings before the House Transportation Committee, April 6, 1981, at 10.

Given the assumption that manufacturers only sell to franchised dealers, that franchised dealers of most makes must maintain unprofitable warranty repair capabilities, that most, if not

all, unfranchised dealers do not maintain such capabilities, that the warranty on a vehicle purchased from an unfranchised dealer may have commenced to run, and that recall notices may evade purchasers from unfranchised dealers, the Court holds that the legislature could have reasonably believed that requiring new car dealers to be franchised would accomplish the legitimate purposes of consumer protection and industry stability.[4] Where, as here, there are

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[4]At various points, Plaintiff suggests that the analysis differs between the 1981 and 1983 enactments. The Court is of the opinion that the same considerations and justifications apply to both measures. The 1983 amendment obviously incorporates the reasons for the passage of its predecessor, in addition to a concern that its purpose was being artfully evaded. See Plaintiff's Brief in support of Complaint at 4-5. The testimony represented that the purpose of the change was to strengthen enforcement power. See proceedings before Senate Economic Development Committee, April 11, 1983, at side 2, pp. 5-6. In any event, the 1983 amendment did not create any new equal protection classifications, or lessen the rationality of the belief that the classification furthers the purpose.

plausible reasons for the legislative action, the inquiry is at an end, Fritz, 449 U.S. at 179, regardless of the existence of less drastic alternatives.

Plaintiff provides evidence, and offers to provide more, that the assumptions and statements provided to the legislature, primarily, if not exclusively by a lobbyist for the new car dealer's association were erroneous. Specifically, it appears that all manufacturers do not require franchised dealers to perform warranty service, see Second Deasy Affidavit, and that warranty service is not unprofitable for many franchised dealers. See Chu Affidavit. Plaintiff suggests that section 5.04 was advanced by the lobbyist as purely a protectionist measure to insulate franchised dealers from low-price competition. Plaintiff

nonetheless acknowledges that the lobbyist "mouthed the intention of protecting the Texas consumer." Memorandum at 9.

It is, however, irrelevant if the legislature was so hoodwinked. In Fritz, Justice Rehnquist, for the majority, rejected the same contention:

> Finally, we disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it.

449 U.S. at 179.

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter

how unwisely the Court may think a political branch has acted. Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted). The Court finds no reason to infer antipathy on the part of the legislature.

Commerce Clause

Plaintiff contends that section 5.04 is an unreasonable burden on interstate commerce. Specifically, it is argued that the provision prevents the free flow of new motor vehicles from franchised dealerships throughout the nation to Plaintiff, and others similarly situated, for retail sale to the public.

The parties concur with the Court's holding that this question is governed by Pike v. Bruce Church, Inc., 397 U.S. 173, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden

> imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Court is of the opinion that the challenged statute imposed no incidental burdens on interstate commerce cognizable by the Constitution. The most serious concern identified in Bruce Church was economic protectionism. Arkansas Electric Corporation v. Arkansas Public Commission, 103 S.Ct. 1905, 1917 (1983). No claim is made that the franchise requirement favors Texas dealers over those elsewhere. Indeed, it may result in encouraging bargain hunters to cross state lines to find new cases. Nor is there any indication that

business will shift from one interstate supplier to another. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

The only conceivable effect that the statute might have is to restrict intrabrand competition, by foreclosing the opportunity of an unfranchised dealer to sell a lower-priced, identical vehicle. This effect alone does not establish a violation of the Commerce Clause. American Motors Sales v. Division of Motor Vehicles, 592 F.2d 219, 223 (4th Cir. 1979), cert. denied, 444 U.S. 836 (1979).

Plaintiff endeavors to show at trial that certain consumers will not merely switch their patronage to a franchised dealer, but will forego consumption altogether because of the price differential. This inevitable functioning of the price elasticity of demand is of no different nor more constitutionally pernicious than an excise tax hike, or a state's decision

to require heightened emission control performance. The commerce clause does not protect the particular structure of a retail market, Exxon, 437 U.S. at 127-128. Accord Detroit Automotive Purchasing Services, Inc. v. Lee, 463 F.Supp. 954, 962 (D.Md. 1978) (finding no burden on interstate commerce from a statute requiring that new car dealers be licensed).

The Supreme Court in Exxon clearly held that the elimination of company-owned service stations as a result of Maryland's divestiture law, depriving consumers of certain special services, was not a concern of the commerce clause. 437 U.S. at 127. The Court noted that "some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by the interstate refiners." Id. Plaintiff seeks to distinguish this case by offering to show at trial that its

sales will not be fulfilled through existing franchise dealers, because of price differences and unavailability due to restrictive quota systems. Second Deasy Affidavit at 3. The Court is unpersuaded by this distinction.

Plaintiff's predicted problems are not reflective of a burden on interstate commerce. The availability problem suggests, if anything, that the quota systems may burden interstate commerce, but in no way suggest that the legislature's actions in this statute at all impede the free flow of interstate goods into Texas. Any manufacturer remains free to send as many new vehicles as it wishes into texas. In Exxon, the Court validated a scheme in which certain interstate suppliers were essentially forbidden to market retail gasoline in Maryland. Similarly, the court recognized that the loss of the lower portion of the price spectrum to

service station customers "relates to the wisdom of the statute, not to its burden in commerce": Id. at 128.

The conclusion bears reemphasis: "The commerce clause does not protect the particular structure or methods of operation in a retail market." Id. at 127.

First Amendment

Plaintiff contends that section 5.04 abridges its freedom of commercial speech under the first amendment. As noted in this Court's opinion of August 13, 1984, advertisement of new car sales by an unfranchised dealer is not entitled to first amendment protection if the statute is "a valid limitation in economic activity". Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, 413 U.S. 376, 389 (1973). Based on the holdings above, the Court

is of the opinion that section 5.04 is a valid limitation on economic activity, and no first amendment rights are infringed.

Accordingly, the Court finds that there are no genuine issues of material fact in this case, and that Defendants are entitled to judgment as a matter of law. Defendants' Renewed Motion for Summary Judgment should be, and hereby is, **GRANTED**. Judgment will be entered accordingly.

SO ORDERED.

DATED: February 28, 1985

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

G. J. DEASY INVESTMENT, INC. d/b/a TEXAS VEHICLE MANAGEMENT Plaintiff	*	
v.	*	Civil Action No. 3-83-1502-H
JAMES A. MATTOX, Attorney General of the State of Texas, et al. Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on both parties' Motions for Summary Judgment, the Briefs in Support, and the pleadings and affidavits on file.

Factual Background

In 1981, the Texas Legislature enacted Section 5.04 of Article 4413(36), the Texas Motor Vehicle Commission Code (hereinafter "MVCC"), which provided in relevant part:

> Sec. 5.04. No person may represent to the public, by advertising or other means, that he is engaged in the business of buying, selling, or exchanging new motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired.

In 1983, Section 5.04 was amended to provide:

> Section 5.04. SALE OF NEW MOTOR VEHICLES. No person may engage in the business of buying, selling, or exchanging new motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such personis a second stage or allied

equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired. In this section, the term "engage in the business of buying, selling, or exchange new motor vehicles" means:

(1) displaying for sale new motor vehicles on a lot or showroom; or

(2) advertising for sale new motor vehicles; or

(3) regularly or actively soliciting buyers for new motor vehicles.

Section 1.03 of the MVCC, as amended in 1983, provides in relevant part:

(2) "New motor vehicle" means a motor vehicle which has not been the subject of a "retail sale" as defined in Subdivision (2), Section 152.001, Tax Code.

* * *

(4) "Dealer" means any person engaged in the business of buying, selling or exchanging new motor vehicles at an established and permanent place of business pursuant to a franchise in effect with a manufacturer or distributor.

* * *

(8) "Franchise" means one or more contracts under which (A) the franchisee is granted the right to sell new motor vehicles manufactured or distributed by the franchisor; (B) the franchisee as an independent business is a component of franchisor's distribution system; (C) the franchisee is substantially associated with franchisor's trademark, tradename and commercial symbol; (D) the franchisee's business is substantially reliant on franchisor for a continued supply of motor vehicles, parts, and accessories for the conduct of its business; or (E) any right, duty, or obligation granted or imposed by this Act is affected.

Section 4.02(a) of the MVCC provides:

Sec. 4.02 (a). The application for a dealer license shall be on a form prescribed by the Commission which shall include information on the applicant's financial resources, business integrity, business ability and experience, franchise agreement, physical facilities for sales and service, parts and accessories, inventory, new vehicle inventory and other factors the Commission considers necessary to determine applicant's qualifications to adequately serve the motoring public.

The Executive Director of the Texas Motor Vehicle Commission, Russell Harding, testifies by affidavit that the intent and purpose of Section 5.04 is to remedy abuses suffered by consumers who purchase new motor vehicles from persons engaged in the sale of new vehicles, but who are neither authorized, franchised or licensed dealers of new vehicles. Harding testifies, and Defendants admit, that Section 5.04, as amended in 1983, is designed to require all new car dealers to obtain a license from the Texas Motor Vehicle Commission. As provided in the MVCC, one condition for obtaining a license to sell new cars is a franchise agreement with a vehicle manufacturer. Failure to satisfy this condition prevents a dealer from obtaining a license.

Harding states that the requirement of a franchise agreement with a manufacturer or distributor is intended to insure: that the

purchaser of a new vehicle will receive all warranty benefits to which he is entitled; that the vehicle is prepared and delivered in accordance with manufacturer specifications; that the vehicle is properly registered for warranty coverage and federal safety recall notices; and that new vehicles sold in Texas comply with federal safety and emission control requirements. Dealers, manufacturers, and distributors must be licensed under the MVCC.

Plaintiff Deasy, doing business as Texas Vehicle Management, is engaged in the business of purchasing new automobiles from various manufacturers' authorized dealerships and offering such vehicles for sale on the manufacturers' statements of origin at reduced prices. Plaintiff is a licensed new car dealer under the MVCC and sells Avanti vehicles. Deasy

is also licensed to sell used vehicles. Thus, Plaintiff legally sells new and used cars under the present MVCC.

Plaintiff brings this suit for declaratory and injunctive relief, contending that Section 5.04 of the MVCC is unconstitutional because: (1) it unconstitutionally delegates legislative power to motor vehicle manufacturers; (2) it violates the Commerce Clause by unreasonably burdening interstate commerce; (3) it violates the Supremacy Clause of the U.S. Constitution by contravening the federal antitrust laws; (4) it unreasonably restrains Plaintiff's freedom of commercial speech under the First Amendment; (5) it deprives Plaintiff of protected liberty interests without due process; and (6) it irrationally draws a distinction between franchised and non-franchised new car dealers in violation of the Fourteenth Amendment's equal protection guarantees.

Due Process

Plaintiff's contention that Section 5.04 constitutes an unconstitutional deprivation of due process has been addressed by a recent United States Supreme Court opinion, Rice v. Norman Williams Co., 102 S.Ct. 3294 (1982). In Rice, at issue was a California statute which provided that a

> licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent.

The California Supreme Court upheld a lower court ruling that the statute on its face conflicted with Section 1 of the Sherman Act, 15 U.S.C. § 1. The U.S. Supreme Court reversed the California courts, holding that the statute was not on its face in conflict with Section 1 of the Sherman Act.

In the Supreme Court, opponents of California's liquor designation statute sought to support the California courts' judgment that the statute was unconstitutional on several federal theories which were not considered by the California courts. The liquor wholesalers who had not been designated by a distiller as authorized dealers contended in the U.S. Supreme Court that the statute denied them due process of law under the Fourteenth Amendment by establishing a second tier of private licensing over the state's licensing process. The Supreme Court rejected the non-authorized wholesaler's argument:

> We find this contention without merit. The designation statute merely enforces the distiller's decision to deny permission to a California wholesaler to deal in the distiller's products. We do not think that respondents possess any constitutionally protected liberty or property interest in obtaining the distiller's permission. Thus, the Due Process Clause is not offended by the wholesaler's inability to challenge the distiller's decisionmaking. What respondents are really challenging is the California Legislature's

decision to give such a power to the distiller without establishing any criteria to govern the exercise of that power. The Due Process Clause does not authorize this Court to assess the wisdom of the California Legislature's decision. See Ferguson v. Skrupa, 372 U.S. 726, 729-732, 83 S.Ct. 1028, 1030-1032, 10 L.Ed.2d 93 (1963).

Rice, supra, at 3302.

Here, as in Rice, the Texas statute establishes as a prerequisite to licensure the requirement that a new car dealer have some franchise agreement with a vehicle manufacturer or distributor before he can sell new cars. Plaintiff argues that the law grants arbitrary power to the vehicle manufacturers, without limits on the power's exercise, to decide which dealers may sell new cars in Texas. However, the Court is of the opinion that, as in Rice, the Texas statute merely enforces the manufacturer's decision to deny permission to a Texas dealer to sell that particular manufacturer's new cars. The statute does not

prevent a dealer from going to any other auto manufacturer and obtaining a franchise agreement.

Plaintiff has not shown that it possesses any constitutionally protected liberty or property interest in obtaining a franchise to sell any particular brand of new cars. As in Rice the Plaintiff appears to be challenging the Texas Legislature's decision to give auto manufacturers the authority to decide who sells the manufacturer's new cars in texas. As the Supreme Court has stated repeatedly since the demise of the reign of substantive due process over state economic legislation:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought . . . (citations omitted). *For protection against abuses by legislatures the people must resort to the polls, not the courts."

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488, 75 S.Ct. 461, 464-5 (1955), citing Munn v. Illinois, 94 U.S. 113, 134 (1876).

To pass the constitutional due process standard, even had Plaintiff shown he is entitled to due process protection, the Defendants need only show that an evil existed and that it might be thought that Section 5.04 was rational way to correct it. Williamson v. Lee Optical, 348 U.S. at 488, 75 S.Ct. at 464. The Harding affidavit, together with Defendant's pleadings demonstrate that Section 5.04 was in part enacted in response to problems involving "bootleg" auto sales in Texas. The Court holds that there is no genuine issue that Section 5.04 was at least a rational attempt by the Texas Legislature to remedy problems associated with "bootleg" new car sales.

The Plaintiff contends that in fact, Section 5.04 does not address the problem as stated by Defendants and Harding. However, whether a statute in fact accomplishes its objective is not relevant in the Court's due process inquiry. Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321, 2330 (1984); Western Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 671-2, 101 S.Ct. 2070, 2084-5 (1981). The Court finds and holds that the Texas Legislature rationally could have believed that Section 5.04 would promote the objective of reducing consumer problems associated with "bootleg" new auto sales.

As an extension of its due process argument, Plaintiff contends that operation of Section 5.04 constitutes an unconstitutional delegation of legislative authority to auto manufacturers in violation of Plaintiff's due process rights. In support of its position, Plaintiff cites,

among other authority, the line of cases beginning with Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Carter v. Carter Coal Co., 298 U.S. 238 (1936). As the amicus has correctly pointed out, this line of cases involved power allocation among branches of the federal government, not the state government, and this "delegation doctrine" is all but obsolete, even in the federal realm.

Plaintiff's remaining delegation arguments must fail in light of the Supreme Court's recent pronouncements. As earlier discussed, the Court finds that Plaintiff did not have a constitutionally protected liberty interest in acquiring a franchise from a manufacturer. Even if Plaintiff had such a protected interest, in Rice v. Norman Williams Co., supra, the Supreme Court rejected a delegation argument similar to that of the Plaintiff:

> What respondents are really challenging is the California Legislature's decision to give such a

> power to the distiller without any criteria to govern the exercise of that power. The Due Process Clause does not authorize this Court to assess the wisdom of the California Legislature's decision.

Here, just as in Rice, Plaintiff asserts that the Texas Legislature's decision to make a franchise agreement with a manufacturer a condition precedent to obtaining a new car dealer license an improper delegation of authority to auto manufacturers. Plaintiff asserts that such a "delegation" places legislative authority in the hands of a few private corporations, that the authority was delegated without any criteria for its exercise, that there is no meaningful review of the manufacturers' decisions, and that the manufacturers are not disinterested decision makers. Plaintiff has copiously researched and presented each of these arguments, and the Court has considered and reviewed the authorities presented. However, the Court is convinced that

the Supreme Court in Rice was correct in holding that where a legislature has established a regulatory pattern involving a "delegation" such as the one represented in Section 5.04, this Court is not authorized to assess the wisdom of legislature's decision.

In New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, S.Ct. 403 (1978), the Supreme Court addressed a delegation argument similar to that being raised by Plaintiff. New Motor Vehicle involved a California statute which required an automobile manufacturer to obtain approval of the New Motor Vehicle Board prior to opening or relocating a franchise only if an existing franchise is nearby and the existing franchisee protests the opening or relocation. Manufacturers challenged the statute arguing, among other things, that the law delegated to existing franchisees the unbridled authority to require manufacturers to

obtain New Motor Vehicle Board approval for opening or relocating franchises. In rejecting the manufacturers' arguments, the Supreme Court stated:

> Appellees and the issue argue that the California scheme constitutes an impermissible delegation of state power to private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protect.
>
> The argument has no merit. Almost any system of private or quasi-private law could be subject to the same objection. Court approval of an eviction, for example, becomes necessary only when the tenant protests his eviction, and he alone decides whether he will protest. An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forego its protection. See Cusack Co. v. Chicago, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472 (1917).

New Motor Vehicle, supra, 439 U.S. at 108-9, 99 S.Ct. at 411. While this point does not specifically dispose of Plaintiff's argument, the Supreme Court's reasoning clearly applies. Operation of Section 5.04 imposes as one condition of licensure that a new car dealer

have a franchise agreement. However, the fact that manufacturers have discretion as to which dealers get franchises does not constitute an impermissible delegation of state power. A new car regulatory scheme requiring "consent" of manufacturers for new car dealers to sell that dealer's brand of new cars is no more objectionable to due process than the California franchise laws which require the "consent" of existing franchisees before a franchise can be opened or relocated.

In summary, the Court is persuaded by the Supreme Court's recent holdings in Rice and New Motor Vehicle to hold that Section 5.04 is not an impermissible delegation of state authority to private parties under due process.

Equal Protection

Plaintiff also contends that Section 5.04 violates the Fourteenth Amendment's Equal Protection Clause. Specifically, Plaintiff

claims that Section 5.04 "unreasonably, arbitrarily, and capriciously separates those sellers of new motor vehicles holding franchise agreements with motor vehicle manufacturers from those who have entered into no such contracts. Such classification bears no relation to any legitimate purpose of the Act and, therefore, deprives TMV of its constitutional right to equal protection of the law." (Plaintiff's Brief, at 47).

The plaintiffs in the Rice case raised an identical challenge to the California liquor designation statute, and the Supreme Court rejected the contention:

> Finally, respondents contend that the designation statute violates the Equal Protection Clause because it discriminates between designated and nondesignated wholesalers. There can be little doubt but that the designation statute is rationally related to the statute's legitimate purposes. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-470, 101 S.Ct. 715, 722-727, 66 L.Ed.2d 659 (1981). The designation statute enables the distiller to place restraints on intrabrand competition in order to foster interbrand competition. It is not our province to determine whether or not

California consumers would be better off had the California Legislature decided not to close off the "Oklahoma connection." See Vance v. Bradley, 440 U.S. 93, 109, 99 S.Ct. 939 (1979). Rice, supra, 102 S.Ct. at 3302. As pointed out by the Supreme Court, the standard for review under the Equal Protection Clause is that a court should not overturn a statute unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that the Court can only conclude that the legislature's actions were irrational. Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943 (1979). States are not required to convince the courts of the correctness of their legislative enactments bear the burden of convincing the courts that the facts upon which the enactments were apparently based could not reasonably be conceived to be true by the governmental decision maker.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 101 S.Ct. 715, 724; Vance v. Bradley, 440 U.S. at 111, 99 S.Ct. at 950.

Plaintiff maintains that a factual issue remains on the question whether the Legislature's distinction between franchised and unf anchised new auto dealers is irrational because, Plaintiff contends, there is no actual difference between a new car dealer with a franchise agreement and a new car dealer without a franchise agreement. The Court is of the opinion that genuine issues of material fact remain with respect to the Plaintiff's burden of demonstrating the irrationality of the Texas Legislature's decision to enact Section 5.04 and with respect to the facts before the Legislature prior to enactment. Accordingly, the Court is unable to say at this point that Defendants are entitled to judgment as a matter of law. This issue might be resolved by presentation of

evidence in affidavit form concerning, among other things, the Legislature's purpose and the facts and testimony considered by the Legislature is enacting Section 5.04, little of which has been submitted to the Court thus far.

Commerce Clause

Plaintiff has also challenged Section 5.04 as an unreasonable burden on interstate commerce. Specifically, Plaintiff contends that Section 5.04 prevents the free flow of new motor vehicles from franchised dealerships throughout the nation to Plaintiff, and others similarly situated, for retail sale to the public.

The standard for determining the validity of a state statute challenged under the Commerce Clause of the United States Constitution is set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844 847 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects

> on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose if found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Under this standard, despite the Defendants' arguments, it appears to the Court that numerous genuine issues of material fact remain. Thus, summary judgment for the Defendants on the Commerce Clause issue is denied. Resolution of this issue might be possible through submissions similar to those made on equal protection issues.

Supremacy Clause - Preemption

Plaintiff also asserts that Section 5.04 violates the Supremacy Clause of the U.S. Constitution and contravenes national pro-

competitive policy. Plaintiff admits that Defendants are not subject to federal antitrust laws, but contends that Section 5.04 establishes a monopoly in franchised new car dealers by preventing unfranchised dealers from selling new cars.

Once again, in Rice, the Supreme Court, in reviewing the California liquor designation statute, set forth the standard this Court should use in determining whether federal pro-competitive policies preempt Section 5.04:

> the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.

Rice v. Norman Williams Co., 102 S.Ct. at 3299. Plaintiff, in all its voluminous pleadings, does not state what specific federal policy, other than the antitrust laws, are implicated buy

operation of Section 5.04. Yet, the MVCC is not preempted by federal pro-competitive policy simply because in a hypothetical situation a private dealer's compliance with Section 5.04 might cause him to violate federal pro-competitive policies. Rice v. Norma Williams Co., 102 S.Ct. at 3299. Furthermore, Section 5.04 is not preempted simply because it might have an anticompetitive effect. Id., at 3299; New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S at 110-11, 99 S.Ct. at 412-3; Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 129-34, 98 S.Ct. 2207, 2215-18 (1978). Before the Court can enjoin enforcement of Section 5.04 on preemption grounds, Section 5.04 must on its face conflict irreconcilably with federal antitrust or pro-competitive policy. Rice v. Norman Williams Co., 102 S.Ct. at 3299.

Plaintiff contends that Section 5.04 "authorizes conduct that necessarily constitutes a violation of the antitrust laws" by allowing manufacturers, distributors, and their franchised dealerships to boycott the unfranchised dealerships. The court holds that such an allegation constitutes no more than a hypothetical situation in which a private party's compliance with Section 5.04 might cause a Sherman Act violation. Rice, supra, at 3299. As such, the Court holds that preemption is not present as a matter of law, and Defendants are entitled to summary judgment on Plaintiff's preemption claims under the Supremacy Clause, regardless whether a rule of reason or a per se standard applies to the hypothetical conduct alleged.

Freedom of Commercial Speech

Plaintiff's final contention is that Section 5.04 abridges Plaintiff's freedom of commercial speech under the First Amendment. Both parties agree that Section 5.04 prohibits unfranchised car dealers from advertising the sale of new cars. The parties are also in agreement that the applicable standards for determining whether commercial speech may be regulated is set forth in Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343 (1980). The threshold issue which the Court must address is whether the expression at issue is protected by the First Amendment. For commercial speech to come within First Amendment protection the speech must concern lawful activity. Central Hudson Gas v. Public Service Commission, 447 U.S. at 566, 100 S.Ct. at 1351. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and

which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." Pittsburgh Press Co. v. Pittsburg Commission on Human Relations, 413 U.S. 376, 389, 93 S.Ct. 2553,2561 (1973).

Here, the heart of Plaintiff's contentions surround the fact that Section 5.04 makes the new car sales by an unfranchised dealer illegal. Thus, advertisement of new car sales by an unfranchised dealer is not entitled First Amendment protections under the Supreme Court's Pittsburgh Press decision if Section 5.04 is "a valid limitation on economic activity". The Court is of the opinion that Section 5.04 could abridge Plaintiff's First Amendment rights only if Section 5.04 is found to be an invalid limitation on economic activity under one of

Plaintiff's two surviving theories of recovery, the Equal Protection Clause or the Commerce Clause.

Conclusion

To summarize the Court's holdings, the Court finds that an absence of genuine issue of material fact exists and that Defendants are entitled to judgment as a matter of law on Plaintiff's claims under due process, the delegation doctrine, and federal preemption. As to these claims, Plaintiff's Motion for Summary Judgment is **DENIED**, and Defendants' Motion for Summary Judgment is **GRANTED**. The Court finds that genuine issues of material fact may exist as to Plaintiff's Equal Protection and Commerce Clause claims. Thus, as to these two claims, Defendants' Motion for Summary Judgment is **DENIED** without prejudice to refiling said motions with additional summary judgment

evidence. The Court **RESERVES** ruling as to Plaintiff's First Amendment claim pending the Court's ruling on the Equal Protection and Commerce Clause claims.

SO ORDERED.

DATED: August 13, 1984.

/s /BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1986, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mary F. Keller, Esq., Special Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711 and David C. Godbey, Esq., Hughes & Luce, 1000 Dallas Building, Dallas, Texas 75201.

James H. Baumgartner

James H. Baumgartner

wp/wc